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No. 99-1289

Supreme Court, U.S.
FILED
MAR 14 2000
CLERK

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC.,

Petitioner,

v.

THE LIMITED, INC., et al.
TARRANT APPAREL GROUP, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC. REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE OBLIGATIONS ALLEGED IN THE AMENDED COMPLAINT ARE COVERED BY THE FALSE CLAIMS ACT

Respondents assert that their liabilities to the United States are merely "possible," Limited Br. in Opp. at 4, that the United States has suffered "no monetary loss," *id.* at 1, and that applying 31 U.S.C. § 3729(a)(7) to their fraud would "detach the False Claims Act from its moorings in government contracts," *id.* at 2, and create a "dangerous new theory of liability." *Id.* All of this is simply wrong: Respondents' unlawful importation of Chinese-made garments triggered fixed, non-contingent, and non-penal obligations to pay both statutory duties and other contractually specified amounts – obligations traditionally enforceable in actions of "debt" at common law – and Respondents later made false statements to conceal those obligations. The United States has, as of this moment, "lost" the monetary amounts owed – which remain in Respondents' pockets – as surely as it has lost any other unpaid obligation. Of course, the facts triggering the obligations remain to be proved, but the facts would have to be proved in *any* duty-collection or FCA case. The frequently superior access of private citizens to the necessary proof is exactly why Customs obligations have been the subject of *qui tam* actions since the beginning of the Republic.

1. Petitioner alleged that Respondents made false statements to conceal a preexisting, unconditional obligation to pay a 10-percent "marking duty" on all goods imported with incorrect country-of-origin labels. Pet. App. at 206-07. By statute, the marking duty obligation

"shall be deemed to have accrued at the time of importation, *shall not be construed as penal,* and shall not be remitted wholly or in part, *nor shall payment thereof be avoidable for any cause.*" 19 U.S.C. § 1304(h) (emphasis added) (Pet. App. at 134-35). The statute thus establishes a firm obligation, and that obligation and its later fraudulent concealment are alleged in this case. The right of an importer to his day in court on the underlying facts that gave rise to the obligation in no way transforms the liability created under this statute into a "contingent" obligation.

Petitioner also alleged that Respondents had (and later fraudulently concealed) a non-contingent obligation to pay contractually liquidated damages for breach of the terms of a Customs entry bond. Pet. App. 204-06. This obligation, too, is unconditionally payable, upon proof of the triggering facts. Petitioner also alleged that Respondents are liable for penalties and forfeitures (Pet. App. 198-204) that are also sufficiently certain to have been traditionally actionable at common law debt. *See* Pet. 6-8.[1]

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[1] Respondents argue that the Sixth Circuit's decision here is supported by *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997). In *Q Int'l*, the government brought a FCA action under a regulation that provided only that "the Postal Service *may require* any person or persons who engage in . . . such activity to pay. . . . " 39 C.F.R. § 310.5(a) (emphasis added). The Eighth Circuit found that this precatory language created only a potential penalty not recognizable at common law debt. 131 F.3d at 774. The unconditional obligations alleged by ATMI in this case differ from those alleged in *Q Int'l* on the precise point that was decisive in that case. *Q Int'l* does not support the decision in this case.

2. Respondents argue that obligations are "contingent" when the United States could have, but has not, brought its own enforcement action, and that Congress could not have intended the FCA to reach such obligations. Limited Br. in Opp. at 5; Tarrant Br. in Opp. at 12. But the only sense in which the obligations are "contingent" is that (as is true at the start of most cases to collect a debt) no one, neither the United States nor Petitioner, has yet proved the facts that give rise to the obligations. The whole theory of the FCA is that either private persons or the United States may bring the claim and supply the proof. Congress deemed the *qui tam* provision of the FCA necessary in part because of the ability of obligors to conceal their obligations from the United States. It is simply inconceivable that Congress meant to exclude the very cases in which the United States has failed to seek to collect an obligation precisely because the concealment has been successful.

3. Respondents insist that Petitioner is asserting a "dangerous new theory" of *qui tam* liability. In fact, *qui tam* enforcement of Customs obligations is of ancient lineage in this country, albeit under other statutes, *see* Pet. at 7 n.1, and Congress clearly indicated, when it amended the FCA to add claims for concealment of "obligations" to the United States without in any way limiting that term, that it meant to cover all such obligations that are once in place and later concealed. Congress sought "to reach all types of fraud, without qualification, that might result in financial loss to the Government." S. Rep. No. 99-345, at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284, *quoting United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1967). It is Respondents who persuaded the court below to

emasculate the obligations provision of the FCA by limiting it to "obligations" that have already been successfully asserted and proved, or conceded, but are somehow concealed by a defendant's falsity. Section 3729(a)(7) speaks in terms of false records or statements to "conceal" an obligation. The word "conceal" has little meaning if obligations awaiting enforcement only because they are unknown to the government are beyond the reach of Section 3729(a)(7).

4. Respondents' contention that this case involves "no monetary loss" to the United States is equally misplaced. On the facts alleged, Respondents owe money to the United States – they have money that rightfully belongs to the Government – and as of this moment the Government has "lost" that money to the same extent as any other money subject to an obligation that has been successfully concealed. Respondents' insistence on an out-of-pocket loss is an effort to return to the days when the FCA covered only payments made *by* the United States and not payments owed *to* the United States. Congress eliminated that distinction in 1986.

II. THE SIXTH CIRCUIT'S REFUSAL TO REVIEW THE RECUSAL ISSUE REQUIRES REVIEW BY THIS COURT

Respondents contend that Vorys, Sater's representation of Judge Holschuh in a state criminal proceeding two months before his assignment to this case requires neither disclosure nor recusal. Respondents offer no explanation of why they and Judge Holschuh both failed to disclose

to Petitioner the participation of Voyrs, Sater's former managing partner, John C. Elam, in Judge Holschuh's defense, or why Judge Holschuh neglected to disclose Mr. Elam's involvement when he sought an informal opinion from another judge, Pet. App. at 76-77, or how Petitioners were supposed to demonstrate the need for vacatur under *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862-64 (1988), when Judge Holschuh refused to permit discovery into the circumstances surrounding the representation.

Respondents cite II *Guide to Judiciary Policies and Procedures*, V-41 § 3.6-2(c) (1977)[2] ["the Guide"] as if it were a conclusive statement that recusal is not necessary because of prior representation of the judge by a lawyer who now represents a party, and they assert that courts have uniformly followed this rule. Limited Br. in Opp. at 13. First, the case law is hardly "uniform." *See In re Cargill, Inc.*, 66 F.3d 1256, 1269 (1st Cir. 1995) ("The existing case law on the subject of judge-attorney dealings rests on exceedingly fact-specific judgments, with different outcomes in different situations"). *See also Smith v. Sikorsky Aircraft*, 420 F. Supp. 661 (C.D. Cal. 1976) (a case in which the judge recused himself under the Canons of Judicial Conduct based on prior representation). Many authorities

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[2] Section 3.6-2(c) is part of the Compendium of Selected Opinions Published by the Advisory Committee on Judicial Activities of the Committee on Codes of Conduct ["the Compendium"].

suggest at least a two-year waiting period after a prior representation.[3]

Second, the cited portion of the Guide – the Compendium – was never intended to offer a controlling rule for all circumstances. The publisher notes that the Compendium "provides important guidance, but it should be read with caution," observing that:

> This Compendium contains summaries of the advice given in response to confidential fact-specific inquiries. While these summaries are intended to provide general guidance, the reader is encouraged to consult the Committee or one of its members with respect to any specific factual situation he or she is confronting. . . . It should be remembered that an activity which is permissible under a particular section may be subject to one of the more general caveats of the Canons (*e.g.*, appearance of impropriety).

Introduction to the Compendium, p. V-i, the Guide.

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[3] *See Duke v. Pfizer, Inc.*, 668 F. Supp. 1031, 1036 (E.D. Mich. 1987), *aff'd*, 867 F.2d 61 (6th Cir. 1989) (comparing the prior representation of a judge by counsel now appearing before him to "the intimate relationship between a judge and his law clerk" and finding a two-year period of repose appropriate); *Bride v. Heckart*, 556 N.W.2d 449, 455 (Iowa 1996) (where less than two years had elapsed, "a party in plaintiff's position might question his impartiality . . . it was error for the . . . district court judge to fail to disclose his prior representation by defense counsel's law firm"). *Accord Morgan Stanley & Co., Inc. v. Sundlun*, No. 88 Civ. 7966, 1988 U.S. Dist. LEXIS 13335 (S.D.N.Y. Nov. 29, 1988) (citing with approval the two-year rule in *Duke* and the decision in *Smith* generally).

Read in context, Section 3.6-2(c) means nothing more than that the existence of a prior attorney-client relationship does not create a *per se* bar to subsequent appearances by a lawyer before his former client. Section 3.6-2(c) of the Compendium does not establish a "controlling rule" that permits a judge's former lawyer or law firm to represent a party in a proceeding before that judge, irrespective of any appearance of impropriety. Where, under the facts and circumstances of a given case, the prior representation could give rise to an appearance of impropriety or where objective facts would cause a reasonable person to question the judge's impartiality, recusal is necessary. Section 3.6-2(c) of the Compendium in no way relieves a court from its ethical responsibilities under the Code of Conduct or its legal responsibilities under 28 U.S.C. § 455(a). The authors of the Compendium did not intend to override 28 U.S.C. § 455(a) and would have no legal authority to do so even if that had been their intent.

Respondents argue that the court of appeals' review of the merits, and its agreement with the district court, mooted any issue of judicial impropriety, but this case perfectly illustrates why that should not be the rule. On the merits, the district court sharply narrowed a federal statute on the basis of "policy" concerns that are not reflected in the language of the statute, and it refused to recognize that Petitioner had brought claims clearly sounding in contract or historically actionable at common law debt that almost certainly fell within the statute even as truncated. Taking up the merits first, the court of appeals affirmed this extraordinary result, and it then decided that it therefore had no responsibility for considering a serious appearance-of-impropriety problem.

Without for a moment suggesting that the court of appeals did not act in good faith, Petitioner respectfully suggests that a rule that allows a particular decision on the merits to obviate a messy inquiry into impropriety provides a subtle, perhaps subconscious temptation to affirm merits decisions. Such a rule tilts the playing field, fails to encourage oversight of judicial misconduct, and could very well undermine the public's confidence in the judicial process.

CONCLUSION

For the reasons stated in the petition and in this brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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